In the Supreme Court of the United States

OCTOBER TERM, 1924

J. W. SUNDERLAND, APPELLANT
v.
THE UNITED STATES OF AMERICA } No. 79

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

STATEMENT

By section 1 of the Act of May 27, 1908, c. 199, 35 Stat. 312, Congress, legislating with respect to lands allotted to members of the Five Civilized Tribes, declared:

> All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood * * * shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

Invoking the exercise of the power granted by this provision, Nathaniel Perryman, a Creek half-blood, applied to the Secretary of the Interior for the removal of restrictions upon a portion of his homestead allotment. This application was granted, the Secretary's order providing "such removal of restrictions to become effective only and simultaneously with the execution of deed by said allottee to the purchaser after said land has been sold in compliance with the directions of the Secretary of the Interior." (Ex. 3, R. 63.) Pursuant thereto, the land was sold and the proceeds retained by the Secretary of the Interior to be disbursed for the benefit of the allottee.

Subsequently, upon application of Perryman (Ex. 18, R. 85, 86) and upon recommendation of the Superintendent of the Five Civilized Tribes (Ex. 8, R. 73), the Secretary of the Interior authorized the purchase, out of a portion of these proceeds, of the tract of land involved in this suit, upon condition that a form of deed, called the Carney-Lacher form, should be used (Ex. 15, R. 81). That form of deed contained the following clause:

> Subject to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force or effect or capable of confirmation or ratification unless made with the consent of and approved by the Secretary of the Interior.

The purchase was made, and a deed containing that clause was executed June 24, 1918, by the owners to Perryman. The deed recited a consideration of $9,600, "the same being funds held by the United States in trust, subject to disbursement under the supervision of the Secretary of the Interior derived from the sale of restricted land." (Ex. 11, R. 76, 77.) The purchase money was paid by check issued to Perryman by the cashier of the Five Civilized Tribes. (Ex. 10, R. 75.)

Disregarding the prohibition in the deed against alienation or incumbrance without approval by the Secretary of the Interior, Perryman executed four instruments affecting this land. Two of these were rental contracts to appellant Sunderland, each covering a portion of the land. (Exs. B and C, R. 6, 8.) The other two were deeds, one of November 30, 1918, conveying for a consideration of $5,000 the entire tract to Sunderland. (Ex. D, R. 9.) The other was a deed dated February 20, 1919, to Perryman's wife, covering a part of the land. (Bill, Par. VI, R. 3.)

To set aside these instruments as null and void and to clear the title of Perryman to this land, the Government brought suit in the United States District Court for the eastern district of Oklahoma. By amendment the bill also sought to set aside a certain judgment, secured by Sunderland in a suit brought in the Superior Court of Tulsa County, Oklahoma, by which title to this land was quieted in him. (Ex. F, R. 11, 12.)

In defense, Sunderland relied upon his State Court judgment and challenged the power of the Secretary of the Interior to control the disposition of the purchased land and the right of Congress to enact legislation giving such power to the Secretary.

The District Court upon a hearing entered a decree cancelling the deeds but upholding the validity of the rental agreements (R. 22–25). The decree was affirmed by the Circuit Court of Appeals (R. 103, Op. R. 98–103), 287 Fed. 468.

The record on appeal to this Court presents only the question of the validity of the deed to Sunderland and the effect of the State Court judgment. However, appellant in his brief abandons the question respecting the State Court judgment. Clearly he could not do otherwise in view of the decisions of this Court, particularly *Bowling* v. *United States*, 233 U. S. 528; *Privett* v. *United States*, 256 U. S. 201.

PROPOSITIONS

I. The Secretary of the Interior was authorized to impose restrictions upon alienation of the land purchased with trust funds.

II. The legislation granting such power is constitutional.

III. There was no error in the admission of evidence.

I.

The Secretary of the Interior was authorized to impose restrictions upon alienation of the land purchased with trust funds.

The prime purpose of the act of May 27, 1908, *supra*, was to make subject to the taxing power of the

State of Oklahoma, lands allotted to certain classes of members of the Five Civilized Tribes who were represented to Congress as competent to manage their property without supervision.

The standard of competency adopted by Congress was the quantum of Indian blood. Thus, all lands of mixed bloods of less than half Indian blood were freed entirely of restrictions; those of half blood and less than three-quarter blood were freed as to all lands, *except homesteads;* and all lands of those of more Indian blood were continued under restriction.

The clear implication is that Congress was not entirely convinced that half-bloods were capable of unsupervised management of their property, and while it was willing to "take a chance" on their capacity, yet it cast an anchor to windward by preserving the homestead. Thus it insured that even if the result of the emancipation of the half-blood with respect to his other lands proved disastrous, he still would not be entirely destitute.

But to provide for cases where the restriction upon alienation might work to the detriment of the Indians and the removal of the restriction might be to his best interest, Congress enacted that part of section 1 with which we are here particularly concerned. We quote it again:

> that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe.

It is important to note that even in this provision Congress proceeded with much caution. The removal of restrictions was to be "under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he [the Secretary] may prescribe." This language leaves no doubt of the intent of Congress to give the Secretary broad discretion in the exercise of the power conferred. It is he to whom is intrusted the determination of what is for the benefit of the Indian. The "benefit of the respective Indians" are the words of the statute, showing that the case of each Indian was to be separately considered. This emphasized the idea of broad discretion, for each Indian's situation presented an individual problem.

It is significant that Congress appeared to have considered that removal of restrictions would only occur when a sale of the land was contemplated, and the inference is that the Secretary would exercise his power only where a sale of the restricted property was deemed advantageous to the Indian and more beneficial to him than its retention would be.

Noteworthy also is the fact that not only were the rules and regulations of the Secretary to govern the *sale* of the property but also the *disposal of the proceeds*. Congress considered one just as important as the other—indeed, there is reason to believe that the disposal of the proceeds was more important, for it would be of little avail to protect the Indian from imposition and an improvident

bargain in the sale of his restricted land, and then to release to him the proceeds. At least the need of protection and supervision in the one was just as great as in the other.

This need of supervision and restraint in the disposal of the proceeds is abundantly demonstrated by the transactions in the instant case. The price paid for the land deeded to Perryman was $9,600. A little more than five months later, appellant Sunderland secured a deed from Perryman for a consideration of $5,000. Moreover it was stipulated at the trial, which was early in 1921, that the land was worth $10,000.

The particular regulation under which the Secretary acted in this case is—

> 20. In any case where lands are purchased for the use and benefit of any citizen of the Five Civilized Tribes of the restricted class, payment for which is made from proceeds arising from the sale of restricted allotted land, or other moneys held under the control of the Department of the Interior, the Superintendent for the Five Civilized Tribes shall cause conveyance of such lands to be made on form of conveyance containing an habendum clause against alienation or encumbrance until April 26, 1931, as follows:
>
> TO HAVE AND TO HOLD said described premises, unto the said grantee, ------ heirs and assigns forever, free and clear and discharged of all former grants, charges, taxes, judgments, mortgages, and other liens and encumbrances of whatsoever nature, subject

> to the condition that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, UNLESS MADE WITH THE CONSENT OF AND APPROVED BY THE SECRETARY OF THE INTERIOR.

Now the test of the validity of the regulations is their reasonableness, appropriateness, and their consistency with the law by which they were authorized. *United States* v. *Morehead*, 243 U. S. 607; *La Motte* v. *United States*, 254 U. S. 570.

We assert that the regulation passes that test for, considered in the light of the evident purpose of Congress, it is not unreasonable, it is not inconsistent with the law, and it certainly is appropriate to carry out the intent of Congress for the protection of the Indian. But even if there were doubt about it, the doubt should be resolved in favor of the validity of the regulation, for it is clear that it is beneficial to the Indian; witness the instant case. *United States* v. *Celestine*, 215 U. S. 278, 290.

The appellant apparently conceives the power of the Secretary, so far as the proceeds of the sale are concerned, as limited to approving or vetoing a proposed investment of them without condition. If that were correct it is difficult to see the need of rules and regulations governing the disposal of the

proceeds. So limited an authority would not make them necessary.

We submit that that is too narrow a definition of the extent of the authority granted. The rule is that such powers are to be broadly construed to accomplish the purpose of Congress. Instances of the application of this rule of construction are *Parker* v. *Richard*, 250 U. S. 235, and *La Motte* v. *United States*, 254 U. S. 570.

Parker v. *Richard* involved a lease of restricted land of a Creek Indian. Section 2 of the Act of May 27, 1908, authorized leases of such land to be made "with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise." The regulations required payment of royalties to the Secretary's representative and authorized the representative to withhold payment in whole or in part for such time as may be in accord with the best interests of the lessor or his heirs. These were held proper and valid—yet the language of the statute was not nearly so broad as in the instant case.

La Motte v. *United States* raised the question of the power of the Secretary under a statute authorizing leases of lands of Osages which prescribed that such leases should be "subject only to the approval of the Secretary of the Interior." It was held that the Secretary was not limited to a mere approval or disapproval of a lease as presented, but that he had power to promulgate regulations prescribing how the

lease should be executed and what conditions and terms should be incorporated therein. The court said (pp. 575, 576):

> It is insistently urged that the regulations adopted and promulgated by the Secretary of the Interior are void and of no effect, and therefore that no right to relief can be predicated upon the defendant's disregard of them. The argument advanced is that the leasing provision says nothing about regulations; that the clause "subject *only* to the approval of the Secretary of the Interior" makes strongly against any regulations; that what is intended is to leave the Indian free to lease in his own way and on his own terms, subject to the Secretary's approval or disapproval of the lease after it is given; and that the regulations, as adopted and promulgated, unwarrantably interfere with this freedom of action. In our opinion the insistence is not tenable. * * *
>
> The leases are subjected to the Secretary's approval or disapproval to the end that the allottees and their heirs may be protected from their own improvidence and from over reaching by others. Both the lands and the Indians are remote from the seat of government, and without some general and authoritative rules for the guidance of intending lessors and lessees it is certain that improvident and ill-advised leases would be given and multiplied in a way which would confuse and embarrass the Indians and greatly enhance the difficulties attending the Secretary's supervision.

And at page 577.

> Without doubt the regulations prescribed operate to restrain the Indian from leasing in his own way and on his own terms, but this is not a valid objection. If there were no regulations, the disapproval of a lease satisfactory to him would work a like restraint. Manifestly some restraint is intended, for the leasing provision does not permit the Indian to lease as he pleases, but only with the Secretary's approval.

There is a further consideration:

The continuing, by section 1 of the Act of May 27, 1908, of restrictions on the homesteads of Indians in the same class as Perryman was in furtherance of the policy of protecting and safeguarding the Indians. When Perryman's homestead allotment was sold that policy obtained as to the proceeds which were substituted for the homestead. The same obligation which the Government had assumed with respect to the homestead it assumed with respect to the proceeds. There was merely a change in the form of that to which the duty extended. The proceeds were trust funds. Being such, the investment of them in other property impressed it with the same trust. *United States* v. *Thurston County*, 143 Fed. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. 87.

While the language of the Act is that "the Secretary of the Interior may remove *restrictions*," yet it really amounts to an authority to the Secretary to sanction a sale of the restricted land.

Other legislation with respect to sales of lands and disposal of the proceeds evidences the policy of Congress to consider the proceeds as trust funds and to authorize supervision of and control over them. The Act of March 1, 1907, c. 2285, 34 Stat. 1015, 1018, provided that any incompetent Indian might sell restricted land allotted to him, or as to which he had an inherited interest, "on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir * * * under the supervision of the Commissioner of Indian Affairs."

The Act of May 29, 1908, c. 216, 35 Stat. 444, sec. 1, contained like language as to the sale of lands "which can be sold under existing law by authority of the Secretary of the Interior" and the disposal of the proceeds.

So also the Act of June 25, 1910, c. 431, 36 Stat. 855, sec. 1, which prescribed that where an allottee died before expiration of the trust period without disposing of the allotment by will the Secretary, if he decided that any of the heirs were incompetent, might "cause such lands to be sold." The provision respecting the proceeds is (p. 856):

> That the proceeds * * * shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent.

Construing these provisions of the Acts of March 1, 1907, and June 25, 1910, the Supreme Court of Washington held in *Rider* v. *La Clair*, 77 Wash. 488, that an Indian could not mortgage personal property purchased with the proceeds of the sale of the allotment of an incompetent Indian. It was said (pp. 491, 492):

> We adopt the words of the trial judge: "I think that upon the sale of an allotment of an incompetent Indian, in pursuance of section 1, Act of Congress of June 30th [25], 1910, . . . or the Act, 34 Stat. L. 1018, . . . the purchase price received by the United States has the same legal status as the allotment itself had and therefore is not subject to alienation by the Indian, and that property purchased (like that in question) by the United States for the Indian with said purchase price, the title being taken in the United States, also has the legal status of the allotment and is not subject to alienation. In other words, the purchase price of such an allotment when sold by the United States, or its proceeds when the United States uses such purchase price to purchase other property for the Indian, taking title in the name of the United States, does not become subject to alienation by the Indian. The United States taking the title in its own name in trust for the Indian is as an express and unequivocal manifestation of its intention not to relinquish the trust—not turn the property over to the Indian to do with as he may please—and it seems to

> me that it rests exclusively with the United States as trustee and as guardian of the Indian to determine when, if at all, it will relinquish the trust and turn over the property to the Indian to do therewith as he may choose."

We do not think the fact that the title to the property purchased with the proceeds was taken in the name of the United States necessarily controlled the decision. It merely was considered a clear indication of the purpose to control and not relinquish the land to the Indian. Nor is there any distinction in principle between personal and real property so purchased.

The Circuit Court of Appeals has now three times passed upon the precise question raised in this case. In addition to the case at bar it upheld the power of the Secretary and the validity of this restriction in the deed in *United States* v. *Law*, 250 Fed. 218, and *United States* v. *Smith*, 288 Fed. 356.

In *United States* v. *Law* the Circuit Court of Appeals supported its decision by an opinion in which the question was discussed at length and the authorities collected and analyzed. In view of this we think it unnecessary to examine and consider in this brief the same authorities.

Appellant contends that the decisions in *United States* v. *Gray*, 284 Fed. 103 (dismissed for want of jurisdiction, 263 U. S. 689), and *United States* v. *Ransom*, 284 Fed. 108 (affirmed per curiam, 263 U. S. 691), have in effect overruled *United States* v.

Law. But, as pointed out by the Circuit Court of Appeals, those cases involved the question of whether lands purchased with restricted or trust funds were subject to state taxation—a very different question from that of the power of the United States to control its Indian wards in the disposition of such lands.

The same is true of *McCurdy* v. *United States*, 246 U. S. 263, also relied upon by appellant. Moreover the statute involved in that case authorized the Secretary of the Interior to pay to any Osage allottee, under rules and regulations to be prescribed by him, all or part of the funds held for his benefit, provided the Secretary was satisfied of the competency of the allottee or that the release of the individual trust funds would be to the best interest and welfare of the allottee. A sum of money so held was released to an allottee and applied in payment for a tract of land.

It will be observed that the authority given by this statute was not as broad as the Act involved in the instant case. The authority was to "pay" or "release" the funds or a part of them.

This court said (p. 272):

> Furthermore, in the case at bar it is not shown that the money released from the trust was invested directly in property restricted as to alienation. Apparently Panther's money had been released six months before the deed to him was executed and was used to pay for a conveyance of the land to Brenner, as trustee for Robert and Emma Panther. What the terms of the trust were,

does not appear. But there is nothing in the record to indicate that a restriction upon the alienation of the land was among them or that the Secretary of the Interior expressly reserved control over the property or its proceeds. It may well be that the Commissioner of Indian Affairs then believed that an ordinary trust of the property for a short period would best advance the interests of Panther. It is consistent with the facts shown that the restriction upon alienation inserted in the deed was not a continuation of control reserved by the Secretary of the Interior, but a bringing under his control of a part of Panther's estate theretofore freed. In this respect and others the present case differs from *United States* v. *Thurston County*, 143 Fed. Rep. 287, much relied upon by the Government.

The same Court of Appeals that decided *United States* v. *Gray* and *United States* v. *Ransom* also decided *United States* v. *Law* and *United States* v. *Smith*, and found no conflict or inconsistency in the decisions, although its attention was called to them in this case.

II

The legislation granting such power is constitutional

A great part of appellant's brief is devoted to an argument that the Act of May 27, 1908, as construed below, is unconstitutional.

We do not think it necessary or profitable to answer that argument in detail. The appellant's claims on this point meet the obstacle of the many decisions

of this Court declaring that the power of Congress with respect to the Indians is plenary. Congress has had at all times the right to pass legislation in the interests of the Indians as a dependent people; citizenship is not incompatible with this guardianship. *Tiger* v. *Western Investment Co.*, 221 U. S. 286.

This power can not be limited or impaired by state legislation. *Blanset* v. *Cardin*, 256 U. S. 319; *Bunch* v. *Cole*, 263 U. S. 250; *Sperry Oil & Gas Co.* v. *Chisholm*, 264 U. S. 488.

Such legislation does not conflict with the Oklahoma Enabling Act of June 16, 1906 (c. 3335, 34 Stat. 267), *Sperry Oil & Gas Co.* v. *Chisholm*, *supra*.

III

There was no error in the admission of evidence

It is difficult to determine the basis for the contention of the appellant that there was not sufficient or competent evidence to support the decree of the District Court. The brief speaks of a failure to prove the authority of the Secretary to impose restrictions upon the purchased land. But the question of whether the Secretary had such authority is a legal one and would depend on a construction of the Act of Congress.

We do not propose to discuss the various items of proof to which appellant refers. Suffice it to call the Court's attention briefly to the fact that in answering the Government's bill defendant admitted, (a) that a *portion* of the homestead allotment of Perry-

man was sold (Ans. par. 1, R. 14); (b) the execution to Perryman of the deed covering the land; and (c) the execution of the deed of Perryman and wife to him (Ans. par. 2, R. 15).

Further appellant testified that before he purchased the land he examined the county records and found the deed to Perryman containing the prohibition against alienation and the endorsement of the Superintendent of the Five Civilized Tribes certifying that the purchase price was derived from the sale of his homestead allotment (R. 59).

Now, nearly all the exhibits introduced by the government showing the transactions affecting the sale of the homestead, the purchase of the land, and the other matters incident thereto set forth in our statement of the case, were copies of documents on file in the office of the Superintendent of the Five Civilized Tribes or in the Bureau of Indian Affairs. These were certified to by the Superintendent of the Five Civilized Tribes and by the Assistant Commissioner of Indian Affairs, respectively. They were properly admitted in evidence. The Act of April 26, 1906, c. 1876, 34 Stat. 137, provides in section 8 that the officer having charge of any of the records pertaining to the enrollment of the members of the Five Civilized Tribes and the disposition of the land and other property of the tribes may make certified copies of such records, *which shall be evidence equally with the originals thereof.* Like authority is given to the Commissioner of

Indian Affairs with respect to records in his office. Act of July 26, 1892, c. 256, 27 Stat. 272.

The Act of August 24, 1912, c. 370, 37 Stat. 497, provides in section 1 that the Secretary of the Interior, the head of any bureau, office, or institution, or any officer of that department may furnish authenticated copies of any official books, records, papers, documents, etc., within his custody and charge specified fees therefor. Section 3 declares that all authenticated copies furnished under this Act shall be admitted in evidence equally with the originals.

CONCLUSION

The judgment of the Circuit Court of Appeals was right and should be affirmed.

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